DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

200202078

TAX EXEMPT AND
GOVERNMENT ENTITIES
DIVISION

Uniform Issue List: 402.07-00, 402.08-01, 664.00-00, 1223.00-00

T:EP:RA:T1

OCT 19 2001

Legend:

Taxpayer A =

Taxpayer B =

Company M =

Stock Exchange N =

Plan X =

Dear :

This is in response to a ruling request dated , as supplemented by additional correspondence dated , and , from your authorized representative concerning sections 72, 401, 402, 408, 664, and 1223 of the Internal Revenue Code ("Code").

The following facts and representations have been submitted:

Taxpayer A, whose date of birth is , is married to Taxpayer B. Taxpayer A attained age during the 2000 calendar year. Taxpayer A was employed by Company M which sponsors Plan X. Plan X is the only profit sharing plan Taxpayer A participates in. Your authorized representative asserts that Plan X is qualified under Code section 401(a). Plan X holds stock of Company M which is listed on Stock Exchange N.

390

Taxpayer A was a participant in Plan X and his account balance included shares of Company M stock which, as of , had a total fair market value of $ . In addition, Taxpayer A had $ worth of other assets, resulting in a total plan value, on , of $ . Taxpayer B is designated as the beneficiary of Taxpayer A's account balance.

It has been represented to Taxpayer A by the Plan's trustee that the total cost basis of Taxpayer A in Plan X is $ , and the full amount of the basis is subject to ordinary income tax. Also, it was represented that this basis was properly calculated under section 1.402(a)-1(b)(2)(ii) of the Income Tax Regulations on a moving average.

Taxpayer A retired in , 1999, at which time he severed his employment relationship with Company M. He took a distribution of all the assets in his Plan X account balance on or about , 1999. In of 2000, an additional contribution was made to Plan X on behalf of Taxpayer A attributable to his last year of service. Taxpayer A participated in Plan X for more than five years. Upon retirement, Taxpayer A created a Charitable Remainder Unitrust ("CRUT") which your authorized representative asserts complies with Code section 664. The initial trustees of the CRUT are Taxpayers A and B.

Plan X permits its participants to elect to have distribution of their account balances paid out in-kind with Company M stock. Following his retirement, Taxpayer A received a distribution from Plan X within one taxable year of all the Company M stock and the other assets in his account balance. Taxpayer A directed that a portion of said distribution, including a portion of the shares of Company M stock held in his account, be directly rolled over to an IRA pursuant to a trustee-to-trustee transfer described in Code section 401(a)(31). The balance of the shares from Plan X (i.e. the "non-rollover shares") were distributed outright to Taxpayer A. Taxpayer A contributed a portion of the "non-rollover shares" of Company M stock to the CRUT. Additionally, Taxpayer A may contribute other property to the CRUT. The total value of Taxpayer A's shares of Company M stock and consequently the total value of shares contributed to the CRUT is less than 10 percent in value of the outstanding stock of Company M.

The remainder beneficiaries of the CRUT will be public charities as defined in Code sections 170(c) and 170(b)(1)(A).

Based on the foregoing facts and representations, you have requested the following rulings:

1) The distribution of the entire Plan X account balance after retirement will meet the requirement of a lump sum distribution within one taxable year of the recipient of the balance to the credit of Taxpayer A's Plan X account balance within the meaning of Code section 402(e)(4)(D)(i).

2) The net unrealized appreciation, within the meaning of Code section 402(e)(4), is the difference between the cost basis attributable to the "non-rollover shares" and the fair market value of the "non-rollover shares" on the date said shares were distributed to Taxpayer A. Taxpayer A will not, therefore, under Code section 402(e)(4)(B), recognize ordinary income on the portion of the "non-rollover shares" representing the net unrealized appreciation.

3) Any taxable gain on the subsequent sale of the "non-rollover shares" will be treated as capital gain income on the sale of a capital asset held in excess of 12 months, to the extent of the original net unrealized appreciation, regardless of the time period between the date said shares were distributed from Plan X and the sale date. Post-distribution gain in excess of the net unrealized appreciation amount will be taxed at the applicable capital gain rate based on the holding period of the stock from the distribution date to the sale date.

4) Taxpayer A will not recognize any immediate taxable income or capital gain or loss from the act of contributing stock received from Plan X to the CRUT.

5) Taxpayer A will receive an income and gift tax charitable deduction for the contribution of the non-rollover shares to the CRUT equal to the fair market value of the stock at the time of transfer less the present value of Taxpayer A's and B's retained unitrust interest.

6) The stock transferred to the CRUT will retain Taxpayer A's cost basis and holding period for purposes of any subsequent sale by the CRUT.

7) The gain from any subsequent sale by the CRUT of the non-rollover shares will be exempt from immediate direct taxation to the CRUT (assuming the CRUT does not have unrelated trade or business income in the year of sale) and to Taxpayers A and B. The amount of any gain to the extent of the net unrealized appreciation, from the sale of the non-rollover shares will be characterized as capital gain income from the sale of a capital asset held in excess of 12 months for purposes of the distribution characterization rules described in Code section 664(b) and Income Tax Regulation section 1.664-1(d). Gain in excess of the net unrealized appreciation will be characterized according to the holding period of the stock from the distribution date from Plan X to the sale date.

With respect to your initial three ruling requests, Code section 402(a) provides, generally, that an amount actually distributed to a taxpayer by a trust described in Code section 401(a) which is exempt from tax under Code section 501(a) shall be taxable in the year of distribution except as otherwise provided in Code section 402.

Code section 402(c)(1) provides, generally, that if (A) any portion of the balance to the credit of an employee in a qualified trust is paid to the employee in an eligible rollover distribution, (B) the distributee transfers any portion of the property received in such distribution to an eligible retirement plan, and (C) in the case of a distribution of property other than money, the amount so transferred consists of the property distributed, then such distribution (to the extent so transferred) shall not be includible in gross income for the taxable year in which paid.

Code section 402(c)(4) provides that the term "eligible rollover distribution" means any distribution to an employee of all or any portion of the balance to the credit of the employee in a qualified trust except the following distributions:

(A) any distribution which is one of a series of substantially equal periodic payments (not less frequently than annually) made –

(i) for the life (or life expectancy) of the employee or the joint lives (or joint life expectancies) of the employee and employee's designated beneficiary, or

(ii) for a period of 10 years or more,

(B) any distribution to the extent the distribution is required under section 401(a)(9), and

(C) any hardship distribution described in section 401(k)(2)(B)(i)(IV).

Code section 402(c)(8) defines eligible retirement plan as (i) an individual retirement account described in section 408(a), (ii) an individual retirement annuity described in section 408(b) (other than an endowment contract), (iii) qualified retirement plan described in section 401(a), and (iv) an annuity plan described in section 403(a).

Code section 402(c)(3) provides, generally, that section 402(c)(1) shall not apply to any transfer of a distribution made after the $60^{th}$ day following the day on which the distributee received the property distributed.

Code section 401(a)(31)(A) provides that a trust shall constitute a section 401(a) qualified trust only if the plan of which such trust is a part provides that if the distributee of any eligible rollover distribution –

(i) elects to have such distribution paid directly to an eligible retirement plan, and

(ii) specifies such eligible retirement plan to which such distribution is to be paid (in such form and at such time as the plan administrator may prescribe),

393

such distribution shall be in the form of a direct trustee-to-trustee transfer to the eligible retirement plan so specified.

Code section 401(a)(31)(B) provides that subparagraph (A) shall apply only to the extent that the eligible rollover distribution would be includible in gross income if not transferred as provided in subparagraph (A) (determined without regard to sections 402(c) and 403(a)(4)).

The term "eligible rollover distribution" when used in section 401(a)(31) has the same meaning as when used in section 402(c).

The term "eligible retirement plan" when used in section 401(a)(31) includes IRAs defined in sections 408(a) and 408(b).

Generally, a direct trustee-to-trustee transfer described in section 401(a)(31) constitutes a "direct rollover" of an "eligible rollover distribution" and is entitled to tax-deferred treatment pursuant to section 402(c).

Section 1.401(a)(31)-1 of the Income Tax Regulations, Question and Answer 5, provides that an eligible rollover distribution that is paid to an eligible retirement plan in a direct rollover is not currently includible in the distributee's gross income under section 402(c).

Section 1.401(a)(31)-1 of the Income Tax Regulations, Question and Answer 14, provides, in pertinent part, that a direct rollover is a distribution and rollover of the eligible rollover distribution and not a transfer of assets and liabilities.

Code section 402(e)(4)(D)(i) provides that, for purposes of this paragraph, the term "lump sum distribution" means the distribution or payment within one taxable year of the recipient of the balance to the credit of an employee which becomes payable to the recipient - (I) on account of the employee's death, (II) after the employee attains age 59 & ½ , (III) on account of the employee's separation from service, or (IV) after the employee has become disabled within the meaning of Code section 72(m)(7), from a trust which forms part of a Code section 401(a) plan which is exempt from tax under Code section 501(a).

Code section 402(e)(4)(D)(i)(III) is applied to an individual who is an employee without regard to section 401(c)(1).

Code section 402(e)(4)(B) provides that, for purposes of Code section 402(a) and Code section 72, in the case of any lump sum distribution which includes securities of the employer corporation, there shall be excluded from gross income the net unrealized appreciation (NUA) attributable to that part of the distribution which consists of securities of the employer corporation.

With respect to NUA, section 1.402(a)-1(b)(1)(i)(b) of the regulations provides that, in the case of a total distribution, the amount of NUA which is not included in the basis of securities in the hands of the distributee at the time of distribution shall be considered gain from the sale or exchange of a capital asset held for more than six months to the extent that such appreciation is realized in a subsequent taxable transaction.

Section 1.402(a)-1(b)(2)(i) of the regulations provides that the amount of the NUA in securities of the employer corporation which are distributed by the trust is the excess of the market value of such securities at the time of distribution over the cost or other basis of such securities to the trust. Thus, if a distribution consists in part of securities which have appreciated in value and in part of securities which have depreciated in value, the NUA shall be considered to consist of the net increase in value of all the securities included in the distribution.

Section 1.402(e)-2(d)(1)(ii)(B) of the proposed regulations provides if a distribution or payment constitutes the balance to the credit of the employee, such distribution or payment shall not be treated as other than a lump sum distribution merely because an additional amount, attributable to the last or a subsequent year of service, is credited to the account of the employee and distributed. Here, the contribution made on behalf of Taxpayer A in of 2000 which was attributable to his last year of service will not preclude the distribution he received in 1999 from being treated as a lump sum distribution.

Code section 402(e)(4)(C) provides that, for purposes of subparagraph (B), NUA and the resulting adjustments to basis shall be determined in accordance with regulations prescribed by the Secretary.

Notice 98-24, 1998-17 I.R.B. 5 provides that the amount of NUA which is not included in the basis of the securities in the hands of the distributee at the time of distribution is considered a gain from the sale or exchange of a capital asset held for more than 18 months to the extent such appreciation is realized in a subsequent taxable transaction. The actual period that an employer security was held by a qualified plan need not be calculated in order to determine whether, with respect to the NUA, the disposition qualifies for the rate of capital assets held for more than 18 months. However, with respect to any further appreciation in the employer securities after distribution from the plan, the actual holding period in the hands of the distributee determines the capital gains rate that applies.

With respect to long-term capital gains treatment during calendar year 1999, the year in which Taxpayer A received his Plan X distribution, the long-term capital gain holding period was 12 months.

In this case, Taxpayer A, who had not yet attained age 70 & 1/2, received a single sum distribution of his entire Plan X account balance during calendar -year 1999 as a

345

result of his separation from the service of Company M. The single sum distribution included Company M stock. Taxpayer A's Plan X distribution is a "lump sum distribution" as that term is used in Code section 402(e)(4)(D).

Taxpayer A's distribution is also an "eligible rollover distribution" as that term is used in Code sections 401(a)(31) and 402(c)(4). Thus, all or any portion of it may be rolled over or directly transferred into an individual retirement arrangement set up and maintained in Taxpayer A's name.

Finally, neither the Code nor the regulations, promulgated thereunder, preclude a distribution from being treated as a lump sum distribution under Code section 402(e)(4)(D) for purposes of Code section 402(e)(4)(B) even if a portion of the distribution is either rolled over or directly transferred into an individual retirement arrangement.

Thus, with respect to your first three ruling requests, we conclude as follows:

1) The distribution of the entire Plan X account balance after retirement will meet the requirement of a lump sum distribution within one taxable year of the recipient of the balance to the credit of Taxpayer A's Plan X account balance within the meaning of Code section 402(e)(4)(D)(i).

2) The net unrealized appreciation, within the meaning of Code section 402(e)(4), is the difference between the cost basis attributable to the "non-rollover shares" and the fair market value of the "non-rollover shares" on the date said shares were distributed to Taxpayer A. Taxpayer A will not, therefore, under Code section 402(e)(4)(B), recognize ordinary income on the portion of the "non-rollover shares" representing the net unrealized appreciation.

3) Any taxable gain on the subsequent sale of the "non-rollover shares" will be treated as capital gain income on the sale of a capital asset held in excess of 12 months, to the extent of the original net unrealized appreciation, regardless of the time period between the date said shares were distributed from Plan X and the sale date. Post-distribution gain in excess of the net unrealized appreciation amount will be taxed at the applicable capital gain rate based on the holding period of the stock from the distribution date to the sale date.

With respect to your fourth ruling request, generally, a donor will not recognize gain on the contribution of appreciated property to charity. However, a donor may recognize gain where there is prearranged plan whereby the donee is under an obligation to enter into transactions involving the donated property that have a benefit to the donor. See Blake v. Commissioner, 697 F. 2d 473 (2d Cir. 1982), aff'g T.C. Memo, 1981-579 (donee obligated to sell appreciated stock received from donor and use proceeds to buy donor's yacht at inflated price).

In this case, there is no indication that there is a prearranged plan involving the CRUT's disposition of the shares of Company M.

Thus, with respect to your fourth ruling request, we conclude as follows:

4) Provided that the trust qualifies as a CRUT under section 664 and there is no prearranged plan for the disposition of the shares of stock by the CRUT, Taxpayer A will not recognize any immediate taxable income or capital gain or loss from the act of contributing stock received from Plan X to the CRUT.

With respect to your fifth ruling request, Code section 170 permits a deduction for any charitable contribution to an organization described in section 170(c) made within the taxable year. Section 1.170A-1(c)(1) of the regulations provides that, if a charitable contribution is made in property other than money, the amount of the contribution is the fair market value of the property at the time of the contribution, reduced as provided in Code section 170(e)(1) and section 1.170A-4(a) of the regulations.

Code section 170(f)(2)(A) provides, in pertinent part, that no deduction is allowed under section 170 for the value of a remainder interest transferred in trust unless the trust is a charitable remainder annuity trust or a CRUTdescribed in Code section 664.

Code section 170(e)(1)(A) provides that a charitable contribution deduction will be reduced by the amount of gain which would not have been long-term capital gain if the property contributed had been sold by the taxpayer at its fair market value, determined at the time of contribution (i.e., the amount of the charitable contribution deduction is limited to basis in the case of ordinary income property and short-term capital gain property). Thus, the amount of a contribution of long-term capital gain property is generally the fair market value of that property. However, section 170(e)(1)(B) provides an exception to this rule. Code section 170(e)(1)(B)(ii) provides that if a contribution is to or for the use of a private foundation (defined in Code section 509(a)) other than a private foundation described in section 170(b)(1)(E), then the charitable contribution deduction will be reduced by the amount of gain which would have been long-term capital gain if the property had been sold by the taxpayer at its fair market value, determined at the time of contribution. It should be noted that section 170(e)(1)(B)(ii) does not apply to reduce the deductible amount in the case of certain capital gain property that is donated to a private foundation described in section 170(b)(1)(E).

Code section 170(e)(5) provides an exception to the rule of section 170(e)(1)(B)(ii) in the case of the contribution of "qualified appreciated stock," which is defined in subparagraph (B) as stock—

(i) for which (as of the date of the contribution) market quotations are readily available on an established securities market, and

(ii) which is capital gain property (as defined in Code section 170(b)(1)(C)(iv)).

Code section 1221 defines a capital asset as property held by the taxpayer, excluding stock in trade, property held primarily for sale to customers in the ordinary course of trade or business, and certain other items not relevant here.

Code section 170(e)(5)(C)(i), however, provides that the "qualified appreciated stock" exception does not apply if the stock contributed (including the aggregate amount of all prior contributions by the donor of stock in the same corporation) exceeds 10 percent in value of all of the outstanding stock in the corporation.

In the instant case, the reduction provided by Code section 170(e)(1)(B)(ii) will not apply, regardless of the type of private foundation that the remainder beneficiary may be, because the exception to section 170(e)(1)(B)(ii) provided by section 170(e)(5) applies. With respect to Taxpayer A, the shares contributed to the CRUT were not stock in trade or held primarily for sale to customers, and the shares had been held by Taxpayer A for more than one year at the time of contribution. Therefore, assuming that the fair market value of the shares of Company M at the time of contribution exceeded basis, the shares were capital gain property within the meaning of section 170(b)(1)(C)(iv). Further, the stock of Company M has market quotations readily available on an established securities market and Taxpayer A did not contribute to the CRUT more than 10 percent in value of all of the outstanding stock of Company M.

Section 170(b) of the Code provides percentage limitations for the charitable contribution deduction of individuals. Code section 170(b)(1)(A) provides that a charitable contribution to an organization described in section 170(b)(1)(A) shall be allowed to the extent that the aggregate of such contributions does not exceed 50 percent of the taxpayer's contribution base for the taxable year. Code section 170(b)(1)(B) provides a lower percentage limitation in the case of a contribution to an organization not described in section 170(b)(1)(A).

The general percentage limitations under Code section 170(b) are modified under sections 170(b)(1)(C) and 170(b)(1)(D) if the property contributed is capital gain property. Code section 170(b)(1)(C)(i) provides that, in the case of a contribution of capital gain property to an organization described in section 170(b)(1)(A), to which section 170(e)(1)(B) does not apply, the total amount of contributions of such property which may be taken into account for determining the income tax deduction shall not exceed 30 percent of the taxpayer's contribution base for the year. Code section 170(b)(1)(D) provides a lower percentage limitation in the case of a contribution of capital gain property to an organization not described in section 170(b)(1)(A).

In Revenue Ruling 79-368, 1979-2 C.B. 109, the Service ruled that the deduction allowed for the value of a remainder interest in property transferred to a CRUT is subject

398

to the percentage limitations set forth in section 170(b)(1)(B) where the grantor or a recipient of the CRUT amount has the power to designate a remainder beneficiary that must be a charitable organization described in section 170(c), but need not be an organization described in section 170(b)(1)(A).

Code section 2501(a) imposes a tax for each calendar year on the transfer of property by gift during such calendar year by any individual. Code section 2511(a) provides that the federal gift tax shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible.

Code section 2522(a) provides that, in computing an individual's taxable gifts for the calendar year, a deduction shall be allowed for the amount of all gifts to or for the use of certain governmental entities, certain corporations organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, and certain other fraternal and veterans' organizations.

Code section 2522(c)(2)(A) provides that, where a transfer is made to both a charitable and noncharitable person or entity, no deduction shall be allowed for the interest passing to charity unless, in the case of a remainder interest, such interest is in a trust which is a charitable remainder annuity trust or charitable remainder unitrust described in section 664.

Code section 664(d)(2), as amended by the Tax Reform Act of 1997 (TRA' 97), defines a charitable remainder unitrust, generally, as a trust:

(A) from which a fixed percentage (which is not less than five (5) percent nor more than 50 percent) of the net fair market value of its assets, valued annually, is to be paid not less often than annually, to one or more persons (at least one of which is not an organization described in section 170(c) and, in the case of individuals, only to an individual who is living at the time of creation of the trust) for a term of years (not in excess of 20 years) or for the life or lives of such individual or individuals,

(B) from which no amount other than the payments described in subparagraph (A) and other than qualified gratuitous transfers described in subparagraph (C) may be paid to or for the use of any person other than an organization described in section 170(c),

(C) following the termination of the payments described in subparagraph (A), the remainder interest in the trust is to be transferred to, or for the use of, an organization described in section 170(c), and

(D) with respect to each contribution of property to the trust, the value (determined under section 7520) of such remainder interest in such property is at least 10 percent of the net fair market value of such property as of the date such property is contributed to the trust.

Under section 664(d)(3), the trust instrument may provide that, in lieu of the amount specified in section 664(d)(2)(A), the trust may pay the income beneficiary for any year the lesser of the income required to be paid under section 664(d)(2)(A) and the amount of trust income for the year.

Under Code section 7520(a), for estate, gift, and income tax purposes, the value of any annuity, any interest for life or term of years, or any remainder or reversionary interest shall be determined: (1) under tables prescribed by the Secretary; and (2) by using an interest rate (rounded to the nearest 2/10ths of 1 percent) equal to 120 percent of the Federal midterm rate in effect under section 1274(d)(1) for the month in which the valuation date falls. If an income, estate, or gift tax charitable deduction is allowable for any part of the property transferred, the taxpayer may elect to use such Federal midterm rate for either of the two months preceding the month in which the valuation falls.

In this case, your authorized representative that, under the CRUT language, the charitable remainderman of the CRUT must be an organization described in Code section 170(b)(1)(A) and Code section 170(c).

If the fair market value of the shares of Company M at the time of the contribution exceeded basis, the shares of Company M contributed to the CRUT were capital gain property within the meaning of section 170(b)(1)(C)(iv). Therefore, Taxpayer A's charitable contribution deduction would be limited as provided by section 170(b)(1)(C). If the shares of Company M were not capital gain property at the time of the contribution, Taxpayer A's charitable deduction would be eligible for the higher percentage limitations of section 170(b)(1)(A).

Thus, based on the above facts and representations, including the fact that the taxpayer did not contribute more than 10 percent in value, in the aggregate, of all the outstanding stock of Company M to the CRUT, we conclude, with respect to your fifth ruling request, as follows:

5) Provided that the remainder beneficiary of the CRUT is an organization described in Code section 170(c), Taxpayer A may take an income tax charitable deduction for the contribution of the non-rolled over shares of Company M stock to the CRUT equal to the fair market value of the stock at the time of the transfer, less the present value of Taxpayer A's and Taxpayer B's retained unitrust interest. Taxpayer A's charitable contribution deduction will be reduced as provided by Code section 170(e)(1)(A), however, by any post-distribution appreciation on the Company M stock that was not held by Taxpayer A for more than one (1) year after distribution from Plan X;

400

Provided the remainder beneficiary of the CRUT is a section 170(b)(1)(A) organization and the shares contributed to the CRUT are capital gain property, as represented, the Taxpayer A's charitable contribution deduction would be subject to the percentage limitations of section 170(b)(1)(C). However, if the CRUT's remainder beneficiary is a section 170(b)(1)(A) organization and the shares of Company M stock to be contributed to the CRUT are not capital gain property, then Taxpayer A's charitable contribution deduction would be subject to the percentage limitations of Code section 170(b)(1)(A). If the remainder beneficiary of the CRUT is not a section 170(b)(1)(A) organization and the shares of Company M contributed to the CRUT are capital gain property, then Taxpayer A's charitable contribution deduction is subject to the percentage limitations of Code section 170(b)(1)(D). If the remainder beneficiary of the CRUT is not a section 170(b)(1)(A) organization, and the shares of Company M stock contributed to the CRUT are not capital gain property, then Taxpayer A's charitable contribution deduction is subject to the percentage limitations of Code section 170(b)(1)(B).

Finally, assuming that the CRUT satisfies the requirements of Code section 664 and the applicable regulations, then a gift tax charitable deduction will be allowed for the present value of the remainder interest which passes to charity; that is, the present value of the right to receive the trust corpus after the death of the survivor of Taxpayers A and B. See Rev. Rul. 79-243. The present value of this interest is determined in accordance with section 25.2522(C)-3(d)(2)(ii) of the regulations and Code section 7520(a).

With respect to your sixth ruling request, Code section 1014(b) provides, in general, that the basis of property in the hands of a person acquiring the property from a decedent or to whom the property passed from a decedent shall, if not sold, exchanged, or otherwise disposed of before the decedent's death by such person, be the fair market value of the property at the time of the decedent's death. Section 1.1014-1(a) of the regulations provides, generally, that property acquired from a decedent includes, principally, property acquired by bequest, devise or inheritance and, in the case of a decedent who dies after December 31, 1953, property required to be includible in determining the value of decedent's gross estate.

Code section 1015(a) provides, generally, that for gifts made after December 31, 1920, if property was acquired by gift, the basis shall be the same as it would be in the hands of the donor or the last preceding owner by whom it was not acquired by gift, except that if such basis (adjusted for the period before the date of the gift as provided in section 1016), is greater than the fair market value of the property at the time of the gift, then for purposes of determining loss, the basis shall be the fair market value.

Section 1.1015-1(a)(1) of the regulations provides, in general, that in the case of property acquired by gift after December 31, 1920 (whether by a transfer in trust or otherwise), the basis of the property for purposes of determining gain is the same as it would be in the hands of the donor or the last preceding owner by whom it was not acquired by gift. The same rule applies in determining loss unless the basis (adjusted in accordance with Code sections 1016 and 1017) is greater than the fair market value of the property at the time of the gift. In such case, the basis for determining loss is the fair market value at the time of the gift.

Code section 1223(2) provides that in determining the period for which a taxpayer has held property however acquired there shall be included the period for which such property was held by any other person, if under Chapter 1 of the Internal Revenue Code, such property has, for purposes of determining gain or loss from a sale or exchange, the same basis in whole or in part in his or her hands as it would have in the hands of such other person.

Code section 1015 provides, generally, that the basis of property acquired by a transfer in trust shall be the same as it would be in the hands of the grantor, with adjustments for gain or loss recognized.

In this case, it has been represented that the CRUT acquired the non-rolled over shares of Company M stock by gift. Accordingly, with respect to your sixth ruling request, we conclude as follows:

6) The basis of the non-rollover shares in the hands of the CRUT's trustee will be determined in accordance with Code section 1015 and section 1.1015-1(a) of the regulations. However, upon Taxpayer A's death, all or a portion of the value of the CRUT property will be includible in Taxpayer A's gross estate for estate tax purposes. See Rev. Rul. 76-273, 1976-2 C.B. 268. To the extent the CRUT is included in Taxpayer A's gross estate, the basis of the non-rollover shares will be determined in accordance with Code section 1014 and section 1.1014-1(a) of the regulations.

To the extent that Code section 1015 and section 1.1015-1(a) apply, then Code section 1223(2) will apply so that the CRUT's holding period in the stock of Company M will include Taxpayer A's holding period.

With respect to your seventh ruling request, Code section 664(c) provides that a CRUT, for any taxable year, is not subject to any tax imposed by subtitle A unless the trust, for the year, has unrelated business taxable income (within the meaning of Code section 512, determined as if part III of subchapter F applied to the trust). Thus, assuming the trust qualifies as a CRUT under Code section 664, the gain from the trust's sale of non-rolled over stock will not be subject to tax under Code section 664(c) if the trust does not have any unrelated business taxable income in the year of the sale.

Thus, with respect to your seventh ruling request, we conclude as follows:

407

7) The gain from any subsequent sale by the CRUT of the non-rollover stock will be exempt from immediate direct taxation to either the CRUT (assuming the CRUT does not have any unrelated trade or business income in the year of sale) or to Taxpayers A and B. The amount of any gain to the extent of the NUA from the sale of the non-rollover shares of Company M stock will be characterized as capital gain income from the sale of a capital asset held in excess of 12 months for purposes of the distribution characterization rules described in Code section 664(b) and Income Tax Regulation section 1.664-1(d). Gain in excess of the NUA will be characterized according to the holding period from the date of distribution from Plan X to the date of sale.

This letter ruling is based on the assumption that Plan X is, and will be, qualified under Code section 401(a) and its trust tax-exempt under Code section 501(a) at all times relevant thereto. It is also based on the assumption that the CRUT referenced herein will meet the requirements of Code section 664 at all times relevant thereto. It is also based on the assumption that all of the representations made with respect thereto are true.

This ruling is directed only to the taxpayer who requested it. Code section 6110(k) provides that it may not be used or cited by others as precedent.

Copies of this ruling have been sent to your authorized representatives pursuant to a power of attorney on file in this office.

403

Should you have any questions concerning this letter ruling, please contact of my staff at .

Sincerely yours,

John Swieca

Manager, Employee Plans
Technical Group 1
Tax Exempt and Government
Entities Division

Enclosures:
Deleted Copy of the Ruling
Notice 437

cc:

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